Supreme Court, U.S.
FILED
00.284 AUG 22 2000

No. 00-

IN THE

Supreme Court of the United States

HOSSEIN ALIKHANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does federal coram nobis lie to vacate a plea of guilty to a federal offense entered by a foreign national kidnaped by United States authorities, who plead to a non-existent (as to him) crime in order to secure his release from custody and was later precluded from seeking civil relief against private entities who caused his abduction and arrest?

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OPINIONS BELOW

The opinion below, of the Eleventh Circuit Court of Appeals, is reported at 200 F.3d 732. It is reproduced in the appendix at App. 1a-6a. Rehearing was denied, in an unpublished order. App. 38a. The district court's order approving the report and recommendation of the Magistrate Judge is unreported. App. 7a-37a.

STATEMENT OF JURISDICTION

Judgment was entered by the Eleventh Circuit Court of Appeals on January 11, 2000 App. 1a. Rehearing and rehearing en banc were denied on June 19, 2000. App. 38a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 28 U.S.C. § 1651(a):

> The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

A. The Events Leading to the Coram Nobis Petition

Hossein Alikhani was kidnaped from The Bahamas in October 1992 by United States Customs agents masquerading as American businessmen who were interested in exporting oil equipment to Libya.[1] Such exports are illegal under various federal laws.[2]

Alikhani, a Cypriot citizen, was flown to the United States and initially held in custody in a hotel in Palm Beach County, Florida. There he was shackled to his bed at night and was compelled during the day to participate in a sting operation to snare suspected American violators of the Libya export laws and regulations. Alikhani was not allowed to inform his family of his predicament, but was led to believe by Customs that after his cooperation, he would be released and allowed to return to Cyprus. However, in November 1992, Alikhani was indicted and transferred from the hotel to a federal prison where he was held without bond.

Alikhani moved to dismiss the indictment, challenging the application of the Libyan Export Control Laws to him, but

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[1] These facts are from the allegations in Alikhani's dismissed Petition for Writ of Error Coram Nobis. *See also* Petition Appendix 8a-11a.

[2] *See* 50 U.S.C. §§ 1701-05, Executive Orders 12543, 12544 and 12730, 31 C.F.R. §§ 550.202, 550.208, 550.209, 550.409, 550.701 of the Libyan Sanctions Regulations and 31 CFR 550.101-.901 (the Export Control Law).

just before the hearing the government offered Alikhani a plea agreement: he could leave the United States if he would plead guilty to one count of violating the Libyan Export Control Laws, continue to cooperate with the government's sting operations, and agree that he "shall not litigate or file a complaint in reference to the circumstances of his arrest in any forum or proceeding."

Alikhani signed the plea agreement with the government, plead guilty, immediately went home to his family in Cyprus, and returned to the Southern District of Florida in April 1993 for his sentencing. He was sentenced to "time served."

In October 1993, Alikhani, his wife Jila and his Cypriot company, Polygon, sued the United States, United Technologies Corporation, United Technologies International, Inc., Turbo Power Marine Systems, Inc., and Albert Baumler in United States District Court for the Southern District of Florida for damages arising out of Alikhani's abduction.[3]

The non-governmental defendants were sued because Alikhani's predicament arose from a September 1990 inquiry he had made to United Technologies regarding the purchase of parts for oil equipment supplied by United Technologies to Libya before the 1986 embargo. Albert Baumler, a United

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[3] The action against the United States was dismissed and is no longer in issue. The United States is a defendant in a pending Federal Tort Claims Act suit brought by these petitioners in the Southern District of Florida. *Alikhani, et al. v. United States*, No. 97-08012. A request to hold that case in abeyance until resolution of this certiorari petition is pending before that district court.

Technologies employee, notified Customs. A year later, as a part of a Customs plan, Baumler telephoned Alikhani to tell him that United Technologies and International Trading Resources, Inc. (a Customs created entity) would supply the parts in which Alikhani had voiced an interest.

Thereafter, Polygon purchased parts from United Technologies and International Trading Resources. The parts were shipped to Germany and re-exported by third parties to Libya.

With the aid and participation of Baumler and his corporate employers, Customs laid a plan to lure Alikhani to The Bahamas to discuss further transactions. But rather than meeting Baumler, Alikhani was met by undercover Customs agents and was told they were flying in a private plane to an outlying island to meet with Baumler. Instead, Alikhani was flown to Florida, and was detained in a Palm Beach County hotel. Alikhani was kept in government custody until he signed the plea agreement and entered his plea to a single count in the indictment charging him with violating the Export Control Laws.

The coram nobis action was an outgrowth of the civil lawsuit later brought by Alikhani, his wife and his company against United Technologies and Baumler. In that action, the defendants argued that the plea agreement's "shall not litigate" language was a bar to the civil action. The district court in the coram nobis case described the choreography leading to its filing: "Judge Hurley dismissed that [civil] action based on Alikhani's agreement, pursuant to his plea, that he would not sue based on his arrest. Judge Hurley implicitly ruled that the

only place in which he could challenge the enforceability of that plea agreement was before this Court by Writ of Coram Nobis." App. 11a-12a, n.2.

B. The Coram Nobis in the District Court

As a consequence of the district court's view of the consequences of the plea in the civil case, Alikhani filed a coram nobis petition seeking to vacate his plea, his plea agreement, and his conviction because: (1) as a foreign national the Export Control Law had no application to his conduct; (2) Alikhani was not subject to the jurisdiction of the United States; (3) the Export Control Law would be unconstitutional and/or in violation of international law if applied to Alikhani.

A magistrate judge recommended dismissal of the coram nobis petition because "'Alikhani failed to demonstrate any compelling circumstances or miscarriage of justice and [failed to] show that he is suffering from any continuing consequences of his conviction.'" App.12a, District Court Order, *quoting* Magistrate Judge's Report and Recommendation.

The district court concluded otherwise: "Because the undersigned does not agree that this writ is unavailable to Alikhani, this Order will first address why this petition is the proper vehicle for Alikhani to present his post-conviction claims for relief, and then it will address the substantive issues raised in the petition which warrant the Court's consideration." App. 12a (footnote omitted).

The district court stated that "the imposition of criminal sanctions, no matter how slight, in the absence of subject matter jurisdiction, qualifies as a miscarriage of justice" and rejected the notion that Alikhani's plea waived all of his rights: "jurisdictional defects cannot be procedurally defaulted or waived. . . . *United States v. Meacham*, 626 F.2d 503, 510 (5th Cir. 1980) (The entry of a guilty plea does not act as a waiver of jurisdictional defects, such as an indictment's failure to charge an offense.)." App. 15a. The district court also found that the fact that Alikhani, by virtue of the plea agreement, "may not seek redress in United States courts for alleged injuries to him by the United States" constituted a serious civil disability cognizable by coram nobis. App. 14a, n.4. The court also summed up the heart of Alikhani's claim:

> Assuming, *arguendo*, that this Court had no jurisdiction to adjudicate Alikhani guilty, he would have been entitled to release from custody with no conditions or plea agreement. Because plea agreements must be knowing and voluntary, if Alikhani was otherwise entitled to his freedom, then by signing the Agreement to secure his freedom, Alikhani, did not voluntarily relinquish his right to seek redress in a subsequent civil suit. *See Vallone v. Lee*, 7 F.3d 196, 199 (11th Cir. 1993); *cf also Hall v. Ochs*, 817 F.2d920, 923 (1st Cir. 1987) (confining a criminal defendant because he may seek civil redress violates his right to liberty).

App. 14a, n.5.

In the end though, the district court held that because the Export Control Law indictment count to which Alikhani plead also contained a 18 U.S.C. § 2 aiding and abetting allegation, he plead guilty to a crime for which he could be charged.[4] Thus, even if the Libya export statutes and regulations did not extend to the conduct of foreign nationals acting outside the United States, the aiding and abetting statute provided a basis for jurisdiction over him: "Thus the 'or another' language extends criminal liability to defendants, like Alikhani, who cause another, who may be innocent of the substantive offense, to engage in conduct that would be criminal if the principal (in this case Alikhani) had done the act himself." App. 26a. The court discounted the fact that the "anothers" were, in this case, government agents or their surrogates. App. 28a and n. 14.

C. The Court of Appeals Decision

The Eleventh Circuit affirmed, limiting its inquiry to one subject: whether the district court had subject matter jurisdiction over Alikhani even if the government did not have the "power to prosecute a non-U.S. person, either because of an implicit limit on the President's power to impose an executive embargo, or because the embargo regulations themselves implicitly bar only transaction by U.S. persons." App. 4a. The court of appeals viewed Alikhani's attacks on the validity and applicability *vel non* of the indictment and the

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[4] 18 U.S.C. § 2(b) provides: "whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

statutory/regulatory scheme "not cognizable on coram nobis review," concluding that only a lack of subject matter jurisdiction could qualify for coram nobis consideration: "A genuine claim that the district court lacked jurisdiction to adjudicate the petitioner guilty may well be a proper ground for coram nobis relief as a matter of law." App. 4a.

Then the court held that there was subject matter jurisdiction in the district court because "The United States filed an indictment charging Alikhani with violating 'laws of the United States,' and [18 U.S.C.] § 3231 on its face empowered the district court to enter judgment upon the merits of the indictment. . . ." Drawing an analogy to subject matter jurisdiction in civil cases, the court held that "'the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case. *Steel Co. v. Citizens for a Better Env't.*, 118 S. Ct. 1003, 1010 (1998) (emphasis in original).'" App. 5a.

Based on that narrow view of the standard for coram nobis relief – that any claim other than subject matter jurisdiction could not be "raised for the first time in a collateral proceeding. . ." (App. 6a) – the court of appeals held that the district court "did not abuse its discretion by denying relief" to Alikhani.

Alikhani seeks review *via* this Petition.

REASONS FOR GRANTING THE WRIT

The decision below presents an important but unanswered question regarding the scope of federal coram nobis jurisdiction, and conflicts with this Court's decision permitting collateral attacks where the claimed errors "constituted a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Addonizio,* 442 U.S. 178, 185 (1979), *quoting Hill v. United States,* 368 U.S. 424, 428 (1962). And the decision below conflicts with decisions of other circuits which have not limited coram nobis to "subject matter jurisdiction."

This Court has recognized the utility of coram nobis: "continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *United States v. Morgan,* 346 U.S. 502, 511 (1954). As the Court said, "otherwise a wrong may stand uncorrected which the available remedy would right." *Id.*, at 512.

The wrong in this case is that Alikhani plead guilty to a crime which he could not commit because the Export Control Law, the Executive Order and the Libyan Regulations do not criminalize acts by a *non* "United States person."

Count II of the indictment, the charge to which Alikhani plead, stated:

> From on or about July 8, 1991, to on or about August 1, 1991, to on or about August 1, 1992 at Riviera Beach and West Palm Beach, Palm Beach County, with West Palm Beach, Florida being the first place to which defendant Alikhani was brought, in the Southern District of Florida, and elsewhere, the defendants,
>
> HOSSEIN ALIKHANI,
> a/k/a J.A. FARAM,
> and
> GEORGE CHRISTOFORU
>
> and others known and unknown to the Grand Jury, did knowingly and willfully violate a license, order and regulation of the United States by transferring, dealing in, exporting and causing the export of goods and technology this is, industrial equipment, in which the Government of Libya had an interest, from the United States to third countries, knowing and having reason to know that the items were intended for transshipment to Libya; all in violation of Title 50, United States Code § 1701, 1702, 1705, Executive Orders 12543 and 12544 and Title 31, Code of Federal Regulations, Section 550.202, 550.208, 550.209, 550.409, and 550.701, and Title 18, United States Code, § 2.

Alikhani was "brought" to the United States by abduction, and it is undisputed that he is not a "United States person." App. 8a, n.1.

The Office of Foreign Assets Control of the United States Department of the Treasury August 1992 Overview of the Libyan Sanctions Regulations – Title 31 Part 550 of the U.S. Code of Federal Regulations "LIBYA, WHAT YOU NEED TO KNOW ABOUT THE U.S. EMBARGO" leaves no doubt that Alikhani was not within the scope of the law:

> The Regulations are still in force and affect all *U.S. Citizens* and permanent residents *wherever they are located*, all people and organizations physically in the United States, and all branches of U.S. organizations throughout the world. (first emphasis supplied).
>
> * * *
>
> *No U.S. person* may perform any contract in support of an industrial or other commercial or government project in Libya. (emphasis supplied).

The Treasury Department's "Treasury News" release of September 1991 is equally explicit: "The Sanctions, however, *prohibit a U.S. individual or company* from exporting services to Libya, as well as from entering into contracts to support projects in Libya or dealing in property in which Libya has an interest." (emphasis supplied). That reading is right because Executive Order No. 12543, the fundament of the Libyan Sanctions, makes clear that their focus is on "United States person." And the January 7, 1986 White House "Fact Sheet" on the "Executive Order on Libya" echoes the emphasis on

United States persons: "Effective February 1, 1986, United States persons shall be prohibited from engaging in the following activities – All . . . exports to Libya from the United States. . . ."

Alikhani is not a United States person. App. 8a, n.1. Polygon is not a United States company. *Id.* Alikhani was not within the scope of the law to which he plead guilty. Nor could he aid and abet, because the principal in this case – the United States person acting as exporter – had obtained a license to export from the Office of Foreign Asset Control.

Thus, Alikhani plead guilty to a crime which, as a matter of law, he could not commit. Under this Court's decisions, Alikhani's plea is not a bar to coram nobis relief. *See United States v. Barboa,* 777 F.2d1420 (10th Cir. 1985), summarizing the Court's holdings:

> A plea of guilty . . . does not bar a claim that the defendant may not constitutionally be convicted in the first instance, "no matter how validly his factual guilt is established." *Menna v. New York,* 423 U.S. 61, 62-63 n.2, 96 S. Ct. 241, 242, n.2, 46 L. Ed. 2d 195 (1975). If Barboa pled guilty to something which was not a crime, he is not now precluded from raising this jurisdictional defect, which goes "to the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge v. Perry,* 417 U.S. 21, 30, 94 S. Ct. 2098, 2103, 40 L.Ed. 2d 628 (1974). *See also United States v. Meacham,* 626 F.2d 503, 509-10 (5th Cir. 1980) (guilty plea does not bar

> jurisdictional claim that indictment for "conspiracy to attempt" failed to charge offense); *Journigan v. Duffy*, 552 F.2d 283, 288-89 (9th Cir. 1977) (guilty plea no bar to claim that defendant was prosecuted under unconstitutional statute).

Id. at 1423, n. 3.

The assemblage of laws utilized against Alikhani can be constitutionally applied to United States persons. But the Constitution cannot countenance a guilty plea to a crime that is non-existent *vis a vis* a person legislatively, administratively and presidentially excluded from the reach of the law. "Where the state is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Menna v. New York*, 423 U.S. 61, 62 (1975).

In *United States v. Addonizio* the Court denied relief because there was "no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the 'fundamental' character that renders the entire proceeding irregular and invalid." 442 U.S. at 186. The Court said: "According to all of the objective criteria – federal jurisdiction, the Constitution, and federal law – the sentence was and is a lawful one." *Id.*, at 187.

If the crime to which Alikhani plead guilty was no crime, then his conviction, sentence, and subsequent civil

disability denying him access to court was not a lawful one. The availability of coram nobis should not have been constricted by the court of appeals. Doing so conflicted with this Court's broader language in *Addonizio, Blackledge, Perry* and *Menna* and with court of appeals decisions like *Barboa* and *Meacham*, which recognize that if something is not a crime, a defendant's guilty plea does not preclude a collateral attack "raising this jurisdictional defect, which goes to the very power of the State to bring the defendant into court to answer the charge brought against him. *Blackledge v. Perry,* 417 U.S. 21, 30. . . ." *Barboa,* 777 F.2d at 1423, n.3.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 22, 2000

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JANUARY 11, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-5546

D. C. Docket Nos. 96-8021-CV-UUB
92-8108-CR-UUB

HOSSEIN ALIKHANI, a.k.a. Hossein Alikani,
a.k.a. J. A. Faram,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(January 11, 2000)

Before COX and DUBINA, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

Appendix A

PER CURIAM:

Hossein Alikhani appeals the denial of his petition for a writ of error coram nobis. We affirm.

Background

Following an unsuccessful attempt to procure certain oil-production equipment in the United States for sale to Libya, Alikhani (a Cypriot) was charged with a criminal violation of executive orders and regulations, promulgated under 50 U.S.C. §§ 1701 and 1702, forbidding all exports to and certain transactions with Libya. Alikhani challenged the indictment by a motion to dismiss under Fed. R. Crim. P. 12(b)(2). That challenge included the arguments that the Libyan embargo regulations do not reach non-"U.S. persons," a term that is defined in Executive Order No. 12543, the primary basis of most of the regulations, and that even if the executive order intended to prohibit conduct by non-U.S. persons, such a prohibition would exceed the president's statutory authority.

The court never ruled on the motion, however, because Alikhani withdrew it after entering a plea agreement. Under that agreement, Alikhani pleaded guilty to the charge of violating the executive orders. Later finding inconvenient a provision in the plea agreement that prohibited him from filing suits concerning his arrest, Alikhani has sought by this coram nobis petition to have his guilty plea invalidated and the plea agreement thereby voided. The district court denied the petition after concluding that Alikhani had not presented any cognizable ground for relief. This court has historically

in unpublished opinions reviewed a denial of coram nobis relief for abuse of discretion, *see Warton v. United States*, No. 91-5133, unpublished op. at 2 (11th Cir. July 30, 1992), and following the practice in other circuits we deem that to be the proper standard of review — keeping in mind that an error of law is an abuse of discretion per se. *See Fleming v. United States*, 146 F.3d 88, 90 (2d Cir. 1998); *United States v. Camacho-Bordes*, 94 F.3d 1168, 1173 (8th Cir. 1996).

Discussion

The bar for coram nobis relief is high. First, the writ is appropriate only when there is and was no other available avenue of relief. *See United States v. Morgan*, 346 U.S. 502, 512, 74 S. Ct. 247, 253 (1954); *Moody v. United States*, 874 F.2d 1575, 1578 (11th Cir. 1989). Second, the writ may issue "only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." *Moody*, 874 F.2d at 1576-77.

In a brief that reads like one on direct appeal from a criminal conviction, Alikhani asserts six challenges to his conviction. Five of the six are facially not cognizable on coram nobis review because Alikhani could have, but failed to, pursue them in a pretrial motion. *See Moody*, 874 F.2d at 1576. Those five are the arguments that (1) the indictment was defective because it failed to show that he lacked U.S. authorization to export equipment to Libya; (2) the statute and executive order issued under it did not prohibit his conduct because the order forbids certain acts by U.S. persons, a category into which he assertedly does not fit;

(3) the export prohibitions do not apply to the transaction in which he was engaging; (4) he cannot properly be held liable on an aiding-and-abetting theory; and (5) the executive orders to whose violation he pleaded guilty were unconstitutionally vague. The district court would not abuse its discretion by rejecting such arguments.

Alikhani makes one argument, however, that he deems to be an attack on the district court's subject-matter jurisdiction: the Government lacks the power to prosecute a non-U.S. person, either because of an implicit limit on the president's power to impose an executive embargo, or because the embargo regulations themselves implicitly bar only transactions by U.S. persons. A genuine claim that the district court lacked jurisdiction to adjudicate the petitioner guilty may well be a proper ground for coram nobis relief as a matter of law. But these statutory arguments, even if meritorious, would not implicate the district court's subject-matter jurisdiction.

"Subject-matter jurisdiction defines the court's authority to hear a given type of case . . . ." *United States v. Morton*, 467 U.S. 822, 828, 104 S. Ct. 2769, 2773 (1984). Congress bestows that authority on lower courts by statute; in our case, Congress has provided the district courts with jurisdiction — "exclusive of the courts of the States" — of "all offenses against the laws of the United States." 18 U.S.C. § 3231. The United States filed an indictment charging Alikhani with violating "laws of the United States," and § 3231 on its face empowered the district court to enter judgment upon the merits of the indictment, such as dismissing the indictment on the ground that it does not allege facts showing that the

defendant committed the charged offense. *See Sardelli v. United States*, 813 F.2d 654, 656 (5th Cir. 1987) (district court has jurisdiction to determine if a certain kind of conduct violates a federal criminal statute). Alikhani has cited no case, and we have located none, holding that the failure of an indictment to state an offense — as Alikhani at bottom contends here — divests the district court of the power even to enter a judgment of acquittal. So to hold would be inconsistent, indeed, with the Supreme Court's insistence in the civil realm that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1010 (1998) (emphasis in original).

Courts have rejected, moreover, the analogous assertion that a failure of allegation or proof on an interstate-commerce element deprives the district court of jurisdiction. An effect on interstate commerce may be required for Congress to have authority under the Commerce Clause to forbid certain conduct. *See United States v. Lopez*, 514 U.S. 549, 562, 115 S. Ct. 1624, 1631 (1995). But to this court and at least one other, that does not imply that a district court faced with an insufficient interstate-commerce nexus loses subject-matter jurisdiction of the case. *See United States v. Viscome*, 144 F.3d 1365, 1370 (11th Cir.) ("Appellant Viscome also attacks the sufficiency of the government's evidence regarding the interstate nexus element. However, Viscome's guilty plea waived all non-jurisdictional defects in the proceedings against him; and Viscome's sufficiency of the evidence challenge is non-jurisdictional."), *cert. denied*, 525 U.S. 941, 119 S. Ct. 1362 (1998); *United States v. Martin*, 147 F.3d

529, 532 (7th Cir. 1998) ("[O]nce a defendant pleads guilty in '[a] court which has jurisdiction of the subject matter and of the defendant, as did the court in the instant case,' the court's judgment cannot be assailed on grounds that the government has not met its burden of proving 'so-called jurisdictional facts.' " (quoting *United States v. Hoyland*, 264 F.2d 346, 352-53 (7th Cir. 1959))). By analogy, even if the Government had to prove that Alikhani was a U.S. person, and even if the Government had failed to allege sufficient facts in the indictment to support an assertion that Alikhani was a U.S. person, the district court would still have had subject-matter jurisdiction over the case.

We thus reject the notion that Alikhani's statutory arguments are jurisdictional. They were not, therefore, properly raised for the first time in a collateral proceeding when they could have been raised earlier. The district court did not abuse its discretion by denying relief.

Conclusion

For the foregoing reasons, we affirm the district court's denial of the petition.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ON MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DATED AND FILED SEPTEMBER 14, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-8021-CIV-UNGARO-BENAGES
Case No. 92-8108-CR-UNGARO-BENAGES

HOSSEIN ALIKHANI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORDER ON MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon Hossein Alikhani's Petition for Writ of Error Coram Nobis **(DE-124)**, filed on January 10, 1996.

THE MATTER was referred to the Honorable Lurana S. Snow, United States Magistrate Judge. A Report and Recommendation ("Report") dated February 27, 1997 has been filed **(DE-159)**, recommending that the petition be DENIED. Extensive objections and responses were filed by

the parties over a period of several months following the issuance of the Report.

THE COURT has reviewed the Petition, objections and responses, has conducted a *de novo* review of the pertinent portions of the record, and is otherwise fully advised in the premises.

I. *BACKGROUND*

In September 1990, Alikhani (using the alias Alikhani Faram)[1] contacted Turbo Power and Marine Systems, Inc., a subsidiary of United Technologies located in West Palm Beach, Florida, regarding the purchase of parts for oil equipment which United Technologies supplied to Libya before 1986 when the United States instituted an embargo precluding export of goods to Libya. Alikhani spoke to employee Albert Baumler who then informed the United States Customs Service of Alikhani's request because Alikhani acknowledged that the parts were destined for Libya. Shortly thereafter, an individual called Baumler from New York and began ordering the parts on Alikhani's behalf. Also, for approximately the next six months, Baumler, Alikhani and this individual exchanged faxes and had telephone conversations concerning price quotations for certain parts for engines located in Libya. No actual orders or money were forthcoming from Alikhani, however, and the discussions terminated in or about January 1991.

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1. Alikhani is and at all relevant times was a citizen of Cyprus and, in 1990-91, was President of Polygon Company, Ltd., a Cypriot company based in Nicosia, Cyprus.

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In July 1991, Customs directed Baumler to re-contact Alikhani to see if he was still interested in the parts, in response to which Alikhani faxed a request for quotes to Baumler. On August 2, 1991, Baumler telephonically introduced Alikhani to Lawrence Connolly who supposedly worked for International Trading Resources, Inc. ("ITR") as agent and sales representative for United Technologies. ITR and Connolly (actually Lawrence O'Donnell) were in reality part of an undercover sting operation by U.S. Customs. Several transactions occurred between the parties as follows: Alikhani would wire money to Florida; and ITR would send parts to Alikhani (actually to his companies) in Germany for transshipment to Libya. Alikhani met with undercover agents in London in March and April 1992, at which time they discussed Alikhani's contracts with the Libyan government and Libyan National Oil Company. In these discussions, Alikhani told the agents that he had registered his company, Polygon, as a Florida corporation in order to avoid paying Cypriot income taxes on the transactions.

Having determined that Alikhani had violated the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-05, multiple Executive Orders and several sections of the Libyan Sanctions Regulations, 31 C.F.R. §550.101 *et seq.*, Customs determined that they would apprehend Alikhani and obtained an arrest warrant on July 10, 1992. They set up a meeting in Nassau, Bahamas where Alikhani was to meet a new contact who supposedly could obtain other materials for Libya. On October 22, 1992, Alikhani arrived in Nassau where he was met by undercover agents who informed Alikhani that he would be going to an out-island to meet their business contact. The plane that the

party boarded was actually an undercover Customs aircraft. Once the plane took off and entered international airspace, the agents placed Alikhani under arrest and brought him to West Palm Beach, Florida.

The agents immediately discussed with Alikhani the possibility of his cooperation in apprehending other suspected exporters of U.S. technology to Libya. Alikhani contacted defense counsel and thereafter agreed to cooperate with the government. The government granted Alikhani use immunity so that Alikhani could detail the circumstances of his conduct and otherwise assist Customs. At the conclusion of his overt cooperation, Alikhani was remanded to the custody of the United States Marshall and incarcerated at Metropolitan Correctional Center until February 5, 1993.

Alikhani and George Christoforou were named as co-defendants in a 13-count indictment on November 19, 1992, charging them with conspiracy to violate the IEEPA, seven substantive violations of IEEPA, and five separate money laundering violations. On December 30, 1992, Alikhani filed a motion to dismiss the indictment for lack of subject matter jurisdiction, an issue presented by the instant petition. On the eve of the hearing on that motion, the government offered Alikhani a plea agreement. On February 5, 1993, Alikhani pleaded guilty to Count II of the indictment pursuant to the plea agreement. Count II charged that Alikhani, from July 8, 1991 to August 1, 1992,

> did knowingly and willfully violate a license, order and regulation of the United States by transferring, dealing in, exporting and causing the

export of goods and technology that is, industrial equipment, in which the Government of Libya had an interest, from the United States to third countries, knowing and having reason to know that the items were intended for transshipment to Libya; all in violation of Title 50, United States Codes § 1701, 1702, 1705, Executive Orders 12543, 12730 and 12544 and Title 31, Code of Federal Regulations, Section 550.202, 550.208, 550.209, 550.409, and 550.701, and Title 18 United States Code, § 2.

Pursuant to the plea agreement, Alikhani was sentenced to time served on April 30, 1993, and Counts I and III-XIII of the indictment were dismissed. As part of his plea agreement, Alikhani agreed to continue to cooperate fully with the United States by testifying when requested to do so. He also agreed that he would "not litigate or file a complaint in reference to the circumstances of his arrest in any forum or proceeding." (DE-89 at ¶ 4). Alikhani immediately left the United States and, since then, has not returned.

The Government contends, and Alikhani does not dispute, that Alikhani has refused to return to the United States to testify in grand jury proceedings in derogation of his plea agreement. Also in violation of his plea agreement, Alikhani filed a civil suit in this district alleging, among other things, that he was kidnapped.[2] Similarly, on October

2. That case was Case No. 93-8513-CIV-HURLEY. Judge Hurley dismissed that action based on Alikhani's agreement, pursuant to his plea, that he would not sue based on his arrest. Judge (Cont'd)

18, 1995 Alikhani filed a Federal Tort Claims Act suit against the United States (Case No. 95-8629-CIV-HURLEY) alleging that he was wrongfully apprehended and arrested. That case was voluntarily dismissed without prejudice when Judge Hurley denied Plaintiff's motion to stay pending the outcome of the instant petition.

The instant petition raises the issues of whether this Court had subject matter jurisdiction over the offenses to which Alikhani pled guilty and whether the relevant statutes are constitutional. The Magistrate Judge did not reach these substantive issues in her Report, recommending instead that the petition be denied because Alikhani failed to demonstrate as a threshold matter that he qualified for the extraordinary relief afforded by the writ of coram nobis. Because the undersigned does not agree that this writ is unavailable to Alikhani, this Order will first address why this petition is the proper vehicle for Alikhani to present his post-conviction claims for relief, and then it will address the substantive issues raised in the petition which warrant the Court's consideration.[3]

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Hurley implicitly ruled that the only place in which he could challenge the enforceability of that plea agreement was before this Court by Writ of Coram Nobis. That case was consolidated with another action, Case No. 95-8569, filed by Alikhani for breach of contract relating to the parts sent to Libya. That case has also been dismissed.

3. The Court's discussion of the substantive issues is compelled by the Report's avoidance of such an inquiry by incorporating by reference the Government's legal analysis contained in pages
(Cont 'd)

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II. *LEGAL ANALYSIS*

A. Appropriateness of the Writ of Coram Nobis

In response to the petition, the Government argued that Alikhani does not qualify for the relief afforded by the extraordinary Writ of Error Coram Nobis. The Magistrate Judge agreed and, without addressing the merits of Alikhani's petition, found that she need not undertake such analysis because "Alikhani failed to demonstrate any compelling circumstance or miscarriage of justice and show that he is suffering from any continuing consequences of his conviction." (Report at 7). For the reasons explained below, the undersigned disagrees with the Magistrate Judge's analysis in denying the petition.

A writ of error coram nobis is a limited and extraordinary remedy reserved for cases in which no statutory remedy is available or adequate. *See United States v. Brown*, 117 F.3d 471, 474-75 (11th Cir. 1997). The Government agrees that this writ is the sole remaining remedy available to Alikhani because he has completely served his sentence. (Response at 19 n.16) *See Lowery v. United States*, 956 F.2d 227, 229 (11th Cir. 1992). Further, "[c]oram nobis jurisdiction exists only to correct 'manifest injustice[,] *Rener v. United States*, 475 F.2d 125, 127 (5th Cir. 1973), . . . [and] where the errors

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(Cont'd)
twenty-four to fifty-four of its response to the petition. *See* Report at 9 n.3. The undersigned does not agree that the Government's discussion is "detailed, thorough and legally correct," nor does the undersigned endorse the wholesale incorporation of thirty pages of a parties argument into a court order.

[are] of the most fundamental character, that is, such as render[ing] the proceeding itself irregular and invalid.' " *Id.* at 230; *Granville v. United States*, 613 F.2d 125, 126 n.1 (5th Cir. 1980) (citations omitted).[4]

Plainly, the imposition of criminal sanctions, no matter how slight, in the absence of subject matter jurisdiction qualifies as a miscarriage of justice.[5] Thus, Alikhani's

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4. The Government and the Magistrate Judge add an additional component to this analysis that has not yet been recognized by this circuit. Apparently, some circuits require a petitioner to demonstrate that he is suffering from continuing consequences of an allegedly invalid conviction. *See, e.g., United States v. Marcello*, 876 F.2d 1147, 1154 (5th Cir. 1989). Although the Court need not apply this standard, the Court notes that Alikhani would satisfy it. In *Marcello*, cited in the Report, the court held that "*coram nobis* is appropriate only where the petitioner can demonstrate that he is suffering civil disabilities as a consequence of the criminal convictions and that the challenged error is of sufficient magnitude to justify the extraordinary relief." *Id.* The Court found that the consequences flowing from an individual's branding as a federal felony is sufficient to warrant coram nobis relief. *Id.* Alikhani's disabilities surpass Marcelo's as a convicted felon who also may not seek redress in United States' courts for alleged injuries to him by the United States.

5. Assuming, *arguendo*, that this Court had no jurisdiction to adjudicate Alikhani guilty, he would have been entitled to release from custody with no conditions or plea agreement. Because plea agreements must be knowing and voluntary, if Alikhani was otherwise entitled to his freedom, then, by signing the agreement to secure his freedom, Alikhani did not voluntarily relinquish his right to seek redress in a subsequent civil suit. *See Vallone v. Lee*, 7 F.3d 196, 199 (11th Cir. 1993); *cf also Hall v. Ochs*, 817 F.2d 920, 923 (1st Cir. 1987) (confining a criminal defendant because he may seek civil redress violates his right to liberty).

petition requires further scrutiny than that given by the Magistrate Judge in her Report. In addition, contrary to the Government's contention that Alikhani has admitted his guilt and cannot now raise claims inconsistent with that admission, jurisdictional defects cannot be procedurally defaulted or waived. *See Harris v. United States*, 1998 WL 471532 (11th Cir. Aug. 13, 1998); *United States v. Meacham*, 626 F.2d 503, 510 (5th Cir. 1980) ("The entry of a guilty plea does not act as a waiver of jurisdictional defects, such as an indictment's failure to charge an offense."); *see also United States v. Caperell*, 938 F.2d 975, 977) (9th Cir. 1991) (claim that indictment failed to state an offense was a jurisdictional claim not waived by guilty plea).[6] As a federal court, "we are courts of limited jurisdiction, deriving our power solely from Article III of the Constitution and from the legislative acts of Congress [and], therefore cannot derive power to act from the actions of the parties before us." *Harris*, at *3 (citations omitted); *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1131 (11th Cir. 1994) ("Subject matter jurisdiction can never be waived or conferred by the consent of the parties.") (citations omitted). We must assure ourselves of jurisdiction, and have the obligation to inquire into

6. This principle is known as the *Blackledge/Menna* principle. *See Menna v. New York*, 423 U.S. 61, 96 S. Ct. 241 (1975) (the state may not convict a person of a charge that it cannot constitutionally prosecute (double jeopardy grounds) regardless of the establishment of factual guilt); *Blackledge v. Perry*, 417 U.S. 21, 30-31, 94 S. Ct. 2098, 2104 (1975) (plea of guilty does not foreclose a subsequent challenge not to be haled into court when initiation of proceedings operates to deny due process of law); *see also United States v. Broce*, 488 U.S. 563, 574-75, 109 S. Ct. 757, 765 (1989) (discussing *Blackledge/Perry* but determining it did not apply in that case).

jurisdiction, whenever the possibility that jurisdiction does not exist arises. *Id.*, *Fitzgerald v. Seaboard Sys. R.R., Inc.*, 760 F.2d 1249, 1250 (11th Cir. 1985). The obligation to inquire into the Court's subject matter jurisdiction over Alikhani's indictment now falls upon this Court.

B. Alikhani's Subject Matter Jurisdiction Claim

The gist of Alikhani's petition is that the statutes and regulations which Alikhani allegedly violated, as enumerated in Count II of the indictment, do not extend to the conduct of foreign nationals acting outside the United States, and thus, this Court had no subject matter jurisdiction to adjudicate him guilty. Further, Alikhani claims that because he was not subject to the export control laws, he could not lawfully be convicted of aiding and abetting a violation of those laws. A careful review of the case law in this and other circuits regarding the aiding and abetting statute, 18 U.S.C. § 2, reveals that at a minimum Alikhani was properly convicted of aiding and abetting the violation of certain of the export regulations upon which Count II is based. As such, it is unnecessary to address the Court's subject matter jurisdiction with respect to each statute. Executive Order and regulation cited in Count II. It is necessary, however, to explain why the Court had subject matter jurisdiction over Count II to the extent it charged Alikhani with aiding and abetting violations of the underlying statutes, Executive Orders and regulations.

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1. Relevant Provisions of Law Governing Trade With Lybia

The various laws that Alikhani was charged with violating in Count II form an intricate regulatory web. They include the following statutes, Executive Orders, and regulations promulgated by the Department of the Treasury:

a. International Emergency Economic Powers Act

In 1977, Congress enacted the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701, *et seq.* Count II charges Alikhani with violations of § 1701[7] and § 1702[8] of the IEEPA. The IEEPA was enacted to extend to

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7. "The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared. . . ." 50 U.S.C. § 1701(b).

8. "1702(a)(1) . . . The President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise — . . ."

> (B) investigate, regulate, direct and compel, nullify, void prevent or prohibit, any . . . use, transfer, withdrawal, transportation, importation, or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

"by any person, or with respect to any property, subject to the jurisdiction of the United States."

peacetime emergencies the powers given to the President during wartime under the Trading with the Enemies Act. *See* 50 U.S.C. App. § 1, *et seq.* In determining whether the IEEPA operates extraterritorially to bring Alikhani within this Court's jurisdiction, the parties argue over the meaning of the statute's description of its application to "any person, or with respect to any property, subject to the jurisdiction of the United States." § 1702(a)(1)(B). The undersigned finds that the language "with respect to any property" gives the President the power to regulate property subject to U.S. jurisdiction including its use (or export) by persons operating beyond the borders of the United States and its territories. *See United States v. McKeeve*, 131 F.3d 1, 11 (1st Cir. 1997) (finding irrelevant under § 1702 that co-conspirators were not subject to U.S. jurisdiction where property at issue was subject to the jurisdiction of the U.S.); *see also Dames & Moore v. Regan*, 453 U.S. 654, 671 (1981) (pointing out that the language of the IEEPA is "sweeping and unqualified"). As a practical matter, however, the IEEPA, § 1701 and § 1702, merely empowered President Reagan to issue the relevant Executive Orders from which the U.S. Treasury derived its power to promulgate the Libyan Sanctions Regulations which operate to criminalize Alikhani's conduct. In any event, it is clear that the Executive Branch had Congressional authority to enact extraterritorial regulations in the event of a declared national emergency pursuant to the IEEPA. Effectively, it is the other violations of law which are being applied extraterritorially to punish Alikhani here in the United States.[9]

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9. Section 1705, under which Alikhani was also charged, establishes penalties for violations of the IEEPA. However, by the section's own terms, violations of subsequently enacted regulations are necessary before § 1705 operates at all.

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b. Executive Orders

The indictment charged Alikhani with violations of Executive Orders 12543, 12730, and 12544. On January 7, 1986 President Reagan issued Executive Order No. 12543 thereby finding pursuant to IEEPA § 1701 that "the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declares a national emergency to deal with that threat." Under Section 1 of that Order, President Reagan prohibited, in relevant part: "(b) The export to Libya of any goods, technology . . . or services from the United States[.]" He further prohibited: "(h) Any transaction by any United States person which evades or avoids, or has the purpose of evading or avoiding, any of the prohibitions set forth in this Order."[10] Finally, Section 4 of the Order authorizes the Secretaries of Treasury and State to take actions, including the promulgation of regulations, as necessary to carry out the purposes of the Order. It is under this authority that the Department of Treasury promulgated the Libyan Sanctions Regulations.

The Court finds no language in § 1(b) of Executive Order 12543 which indicates that its application is limited to U.S. persons as Alikhani argues. Further, although § 1(b) is silent as to its extraterritorial effect, the Court infers that such a use was intended from the use of limiting language in other

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10. The Order defined the term "United States person" as "any United States citizen, permanent resident alien, juridical person organized under the laws of the United States or any person in the United States." It is clear that Alikhani does not fall into the definition of "United States person."

portions of the Order not included in § 1(b). In several sections and subsections, including for example § 1(h), the Order specifically limits the relevant prohibitions to transactions "by a United States person." Section 1(b) contains no such restriction. The Court additionally infers the extraterritorial effect of § 1(b) from the Order's purpose — the regulation of international transactions — and its legislative history. *See United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980) (citing *United States v. Bowman*, 260 U.S 94, 97-98 (1922)).

Alikhani further argues that the Executive Order does not apply to him because he did not "export" the goods from the United States. An export, he argues, must result from an act done by a U.S. person as defined in the Order. He goes on to explain the definition of "export" and why he does not fit into that definition. *See Canton R.R. Co. v. Rogan*, 340 U.S. 511, 515 (1951) (defining export as carrying or sending abroad and import as bringing into the country). Regarding this argument, the Court adopts the position of the Seventh Circuit which stated: "The buyer-seller, importer-exporter labels tend to lead the arguments down the road of semantics rather than substance." *United States v. Beck*, 615 F.2d 441, 450 (7th Cir. 1980).[11] In any event, the Court need not resolve this debate because, as explained below, Alikhani is guilty of aiding and abetting the violation of Executive Order 12543, § 1(b) regardless of whether he actually exported anything.

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11. The Court addresses this issue in small part in its discussion of the aiding and abetting statute *infra* at the last part of § II.B.2.b.

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As to Executive Order 12544, which blocks all Libyan Government property in the U.S. or held by U.S. persons, the Court finds that it is inapplicable to the instant petition and to the conduct to which Alikhani pled guilty in Count II of the indictment. Similarly, Executive Order 12730, signed by President Bush and also listed in Count II, continues the state of national emergency with respect to Libya and incorporates the Export Administration Act and other statutes and Executive Orders as applicable to Libya. Thus, it appears that this Order is also irrelevant to the instant petition, which perhaps explains why it was not addressed at all by the parties in their memoranda.

c. Libyan Sanctions Regulations

Count II next charges Alikhani with violations of five Treasury Regulations promulgated as part of the "Libyan Sanctions Regulations" under the authority granted to the Secretary of the Treasury pursuant to the IEEPA and Executive Order 12543: 31 C.F.R. §§ 550.202, 550.208, 550.209, 550.409 and 550.701. As an initial matter, the Court finds § 550.209, which prohibits transactions involving property in which the Government of Libya has an interest and with respect to securities, wholly inapplicable to the facts pled in Count II. Section 550.701 is also irrelevant to the issue of subject matter jurisdiction as it sets forth the penalties for violations of the Libyan Sanctions Regulations which, in any event, are not challenged by Alikhani's petition.

Similar to Executive Order 12543, § 550.202 prohibits exports of goods, technology or services to Libya. The Court has already explained in subsection "b," *supra*, why this

prohibition extends to persons outside the United States such as Alikhani. Moreover, the Court is not persuaded by Alikhani's strict construction of the word "export," and, even if Alikhani was incapable of exporting under his definition of the word, his conviction for aiding and abetting still stands. *See infra* at § II.B.2.

Section 550.208 states that "[a]ny transaction for the purpose of, or which has the effect of, evading or avoiding any of the prohibitions set forth in this subpart is hereby prohibited." Alikhani argues, and the Government concedes, that this section only applies to U.S. persons as defined in the regulations. It is identical to § 1(h) of Executive Order 12543 *without* the qualifier "by any United States person" contained in the Executive Order. The parties read this omission as an oversight by Congress. As the applicability of § 550.208 to Alikhani is not dispositive of the issues raised by the Petition, the Court, despite doubts, will defer to the parties.

Section 550.409 prohibits exports to third countries if the exporter knows or has reason to know that the goods are intended for transshipment to Libya. Under Alikhani's own admissions by pleading guilty, his actions fall within this section assuming he actually exported. But for Alikhani's argument that he is not the "exporter," he did transship the goods to Libya via Germany. This is why, as explained below, Alikhani falls within the purview of the aiding and abetting statute, and why the Court, once again, need not resolve the definition of "export" debate.

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2. The Aiding and Abetting Statute

Having explained the substantive laws and regulations under which Alikhani was charged, the Court now turns to the applicability of the aiding and abetting statute to Alikhani. The final statutory violation charged in Count II is of the aiding and abetting statute ("the statute"):

> **§ 2. Principals**
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2. The focus of the parties memoranda has been on subsection (b). It is the Government's contention, as alleged in Count II, that Alikhani caused the export of technology to Libya in violation of the applicable statutes, Executive Orders and regulations discussed above, and that therefore, he is criminally liable for those acts just as if he personally committed those crimes himself. Alikhani recognizes the breadth of this statute but argues that there are recognized exceptions within which he falls. As explained below, the case law brings Alikhani's conduct squarely within the statute with respect to the relevant substantive offenses charged in Count II, and none of the exceptions proposed by Alikhani are apposite to this action.

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a. The law on aiding and abetting

Alikhani contends that he could not have "exported" goods or technology from the United States because he was outside the United States. Assuming *arguendo* that the term "export" should receive the narrow construction advocated by Alikhani and that, therefore, he could not possibly have exported parts to Libya, his argument still fails. The law in this and other circuits clearly provides that an individual need not have the capacity to commit a crime in order to be guilty of aiding and abetting. *See, e.g., United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983) (a person with no duty to disclose financial information or file currency transaction reports can be found guilty under §2(b)); *United States v. Phipps*, 81 F.3d 1056, 1061 (11th Cir. 1996) (citing *Tobon-Builes*); *United States v. Sans*, 731 F.2d 1521, 1531 (11th Cir. 1984) (same). "It is well established that § 2(b) was designed to impose criminal liability on one who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged[.]" *Tobon-Builes*, 706 F.2d at 1099.[12] Thus, Alikhani could still

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12. As cited in *Tobon-Builes*, several circuits follow this rule. *See, United States v. Pereira*, 202 F.2d 830, 836-37 (5th Cir. 1953) (applying § 2(b) in finding defendant liable as principal under 18 U.S.C. § 2314 for willfully causing innocent bank clerk to mail into interstate commerce a fraudulently obtained check); *United States v. Ruffin*, 613 F.2d 408, 412 (2nd Cir. 1979) ("It is . . . clear that under 18 U.S.C. § 2(b) one who causes another to commit a criminal act may be found guilty as a principal even though the agent who committed the act is innocent or acquitted."); *United*

(Cont'd)

be liable for aiding and abetting the export even if he was incapable of executing it himself.

With respect to Alikhani's argument that he could not have exported goods within the meaning of the Executive Orders and Regulations from outside the United States because he is not a "U.S. person," *Tobon Builes* further disposes of that concern. A person "who is incapable of committing a substantive criminal offense if he acted alone may nevertheless be liable as a principal where he willfully causes the prohibited conduct [(*e.g.* export from U.S. to Libya)] to be committed by intermediaries [(*e.g.* whoever exported the goods from the U.S. to Alikhani)] who have the capacity to commit the substantive criminal offense but who lack the criminal intent to be guilty of that offense." 706 F.2d at 1100; *see also Ruffin*, 613 F.2d at 412; *Lester*, 363 F.2d at 72-73 (under § 2(b) defendants liable for conspiring to willfully cause police officers to act "under color of state law" to deprive third party of civil rights (18 U.S.C. § 242) even though police officers were found innocent of any wrongdoing and defendants lacked legal capacity to act "under color of state law").

(Cont'd)

States v. Catena, 500 F.2d 1319, 1323 (3rd Cir. 1974) (under § 2(b), a person may be guilty of causing a false claim to be presented to the United States even though he uses an innocent intermediary, *e.g.*, insurance carriers, to actually pass on the claims to the United States); *United States v. Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); *United States v. Inciso*, 292 F.2d 374, 378 (7th Cir. 1961).

This interpretation is further supported by § 2(b)'s legislative history.[13] The purpose of the 1951 Amendment was "to . . . make certain the intent to punish [persons embraced within § 2] . . . , regardless of the fact that they may be incapable of committing the specific violation." *Tobon-Builes*, 706 F.2d at 1100 (quoting 1951 U.S. Code Cong. & Ad. News, at 2578, 2583). The *Tobon-Builes* court expressed agreement with the Court in *Ruffin*, 613 F.2d at 413, that Congress amended § 2(b) "to enlarge the scope of criminal liability under existing substantive criminal laws so that a person who operates from behind the scenes may be convicted **even though he is not expressly prohibited by the substantive statute from engaging in the acts made criminal by Congress**." *Id.* (emphasis added). Thus, the "or another" language extends criminal liability to defendants, like Alikhani, who cause another, who may be innocent of the substantive offense, to engage in conduct that would be criminal if the principal (in this case Alikhani) had done the act himself.

The court in *United States v. Lester*, 363 F.2d at 73, provided a cogent analysis of the underlying principles supporting the application of § 2(b) in a case analogous to Alikhani's:

> It is but to quote hornbook law to say that in every crime there must exist a union or joint operation

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13. Prior to 1951, 18 U.S.C. § 2(b) provided: "Whoever willfully causes an act to be done which if directly performed by him would be an offense against the United States is also a principal and punishable as such." The words "by another" were added after the words "by him" in 1951.

> of act, or failure to act, and intent. However, this is far from suggesting that the essential element of criminal intent must always reside in the person who does the forbidden act. Indeed, the latter may act without any criminal intent whatever, while the mens rea — "wilfulness" — may reside in a person wholly incapable of committing the forbidden act. When such is the case, as at bar, the "joint operation of act and intent" prerequisite to commission of the crime is provided by the person who willfully causes the innocent actor to commit the illegal act. And in such a case, of course, only the person who willfully causes the forbidden act to be done is guilty of the crime.

Id. In the instant case, Alikhani admitted to his knowledge of the Executive Orders and Regulations and admitted that he intended to effect the export of embargoed goods and technology to Libya. Further, there is no question that he purchased goods and equipment with funds that he had wired into the U.S. and which goods he caused to be shipped to Germany for transshipment to Libya. The export of these goods undoubtedly violated Executive Order 12543 and various Regulations. Thus, by operation of § 2(b), Alikhani's criminal intent to violate the Libyan Sanctions Regulations and Executive Order 12543 is joined together with the conduct of those who participated in the exportations (*i.e.* capacity to commit violations of the regulations) to constitute a violation of law as charged in Count II of the indictment. *See id.* at 1101.

Alikhani makes much of the Government's failure to name the principal who Alikhani allegedly aided and abetted. This determination, however, is unnecessary to sustain Alikhani's conviction pursuant to § 2(b). This Circuit has held that: "In order to sustain the conviction of a defendant who has been charged as an aider or abetter, it is necessary that there be evidence showing an offense to have been committed by a principal and that the principal was aided or abetted by the accused, **although it is not necessary that the principal be convicted or even that the identity of the principal be established.**" *United States v. Matassini*, 565 F.2d 1297, 1314 (5th Cir. 1978) (emphasis supplied).

Alikhani also seems to be arguing that he could not aid and abet the actual exporters, who the undersigned presumes is either United Technologies or ITR, because they are government agents. That argument, however, has been rejected by several circuits which have upheld convictions for aiding and abetting where the underlying criminal activity was undertaken by government agents. *See United States v. Ngo*, 141 F.3d 1182 (9th Cir. 1998) (unpublished decision) (upholding conviction for aiding and abetting the possession and uttering of counterfeit securities committed by government agents); *United States v. Aguilar*, 883 F.2d 662, 688 (9th Cir. 1989) (en banc) (upholding conviction for aiding and abetting transportation of illegal aliens despite fact that government agents transported the aliens).[14]

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14. *See also United States v. Meinster*, 619 F.2d 1041, 1046 (4th Cir. 1980) (upholding conviction for aiding and abetting drug smuggling and rejecting appellants' claim that "the absence of a guilty principle precludes their conviction on aiding and abetting

(Cont'd)

b. Alikhani's "exceptions" to the application of § 2(b)

Alikhani offers two primary cases which allegedly support his contention that pursuant to the "Wharton Rule" he could not be convicted for aiding and abetting violations of the relevant portions of Executive Order 12543 and the Regulations. Alikhani first relies on *Gebardi v. United States*, 287 U.S. 112 (1932), in which the Supreme Court reversed the conviction of a female defendant who allegedly conspired to violate the Mann Act by consenting to her own transportation across state lines.[15] The Mann Act, which

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charges"); *United States v. Ordner*, 554 F.2d 24, 29 (2d Cir. 1977) (upholding conviction for aiding and abetting unlawful possession and transfer of firearms by government agents because "the guilt or innocence of the intermediary under a § 2(b) charge is irrelevant"); *United States v. Gould*, 419 F.2d 825, 826 (9th Cir. 1969) (per curiam) (upholding conviction for aiding and abetting the smuggling of marijuana even though there was no "guilty principle" because the drugs were actually "smuggled" over the border by a government agent); *see also United States v. Pardue*, 983 F.2d 843 (8th Cir. 1993) (upholding conviction for aiding and abetting interstate travel in connection with murder for hire where defendant drove across state line to mail cash to government agent posing as contract killer); *Haynes v. United States*, 319 F.2d 620, 622 (5th Cir. 1963) (rejecting theory that evidence was insufficient to uphold conviction because marijuana was brought in to U.S. by government agents which is not a crime).

15. *Gebardi* involves the general conspiracy statute as opposed to the aiding and abetting statute. The two, however, are often viewed as analogous because "much of the same evidence that will support
(Cont'd)

prohibited the transportation of women across state lines for immoral purposes, did not criminalize the woman's conduct who is being transported. Instead, the government prosecuted the woman for conspiracy to violate the Mann Act. The Court recognized that a woman can be convicted for conspiracy despite her incapacity to commit a substantive offense. *Id.* at 120-21. The Court determined, however, that because a violation of the Mann Act required the agreement of the woman, by protecting women from criminal prosecution under the statute Congress manifested an affirmative legislative policy "to leave her acquiescence unpunished." *Id.* at 123.

The Fifth Circuit applied these principles in *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), in which the court held that, pursuant to *Gebardi*, foreign officials may not be prosecuted for conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, 78dd-2. In *Castle*, the alleged conspiracy involved two Americans bribing two Canadian officials. Only the Americans' conduct was punishable under the FCPA, so the government charged the Canadians with conspiracy. The court concluded that it was Congress's clear intention not to prosecute foreign officials but only U.S. entities and citizens. 925 F.2d at 834.

(Cont'd)
a conviction of conspiracy will also support a conviction of aiding and abetting." *United States v. Long*, 866 F.2d 402, 407 (11th Cir. 1989); *see also United States v. Falletta*, 523 F.2d 1198, 1199-2000 (5th Cir. 1975) (recognizing that the logic of *Gebardi* has equal force in either the conspiracy or aiding and abetting context).

Appendix B

These cases involve the "community of purpose of two persons" rule, also known as the Wharton Rule, which states that when a crime is of such a nature as to necessarily require the participation of two persons for its commission, an agreement by two persons to commit the crime cannot be prosecuted as a conspiracy. *Gebardi*, 287 U.S. at 121-22; 1 R. Anderson, Wharton's Criminal Law and Procedure s 89, p. 191 (1957); *see also Iannelli v. United States*, 420 U.S. 770, 773 n.5 (1975); *United States v. Brenson*, 104 F.3d 1267, 1283 (11th Cir. 1997). The rule is not absolute and is inapplicable, for example, where the substantive crime can be committed by a single individual. *Id.* at n.6; *Falletta*, 523 F.2d at 1200. The Mann Act contemplated that both the man and the woman were necessary to the transaction. "[W]hen the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter." *Gebardi*, 287 U.S. at 123.

The Government argues simply, and without further explanation, that a single individual can violate the Libyan Sanction Regulations, thus the principles espoused in *Gebardi* do not apply. Alikhani responds that the criminal act in the subject regulations is export which necessarily requires the presence of at least two persons: a U.S.-based exporter and a foreign-based importer (such as Alikhani) whose purchase order "causes" the export. Although Alikhani's argument has a certain logical appeal and is not

without respectable supporting authority,[16] the law involving the Wharton or *Gebardi* Rule has evolved beyond Alikhani's proposed application.

In *United States v. Falletta*, 523 F.2d 1198 (5th Cir. 1975), a case cited by Alikhani, the former Fifth Circuit expressed reservations about this rule which, as it stated, "amounts at best to a weak presumption about legislative intent. Other factors can be invoked to the contrary, and we find that contrary and overriding indications are present in this case." *Falletta*, 523 F.2d at 1200; *see also United States v. Collins*, 779 F.2d 1520, 1527 (11th Cir. 1986) (recognizing that the former Fifth Circuit did not generally favor Wharton's Rule and that the Supreme Court stated that it has "current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary." *Iannelli*, 420 U.S. at 782).[17] In *Falletta*, the court applied

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16. *See, e.g., Castle*, 925 F.2d 831; *United States v. Nasser*, 476 F.2d 1111 (7th Cir. 1973) (under statute prohibiting attorney from handling case on which he previously worked as a government employee, client cannot be prosecuted as a conspirator for bringing case to attorney); *Nigro v. United States*, 117 F.2d 624 (8th Cir. 1941) (purchaser of narcotics cannot be prosecuted for conspiracy to violate federal statute prohibiting sale of narcotics).

17. The *Falletta* court expressed the view that there was no distinction between the application of the Wharton Rule to aiding and abetting cases and conspiracy cases from which the Rule arose. 523 F.2d at 1199-1200. Over time, however, the interpretation of the Wharton Rule in the case law has evolved in conjunction with the conspiracy statute in a manner inconsistent with the aiding and abetting statute. *See, generally, Iannelli v. United States*, 420 U.S.

(Cont'd)

the aiding and abetting statute to a defendant who furnished a firearm to a person (or felon) prohibited by 18 U.S.C. § 1202 from receiving it. *Id.* The court determined that Congress's focus was to restrict the *possession* of firearms by certain groups of people, and, based on this interpretation of the legislative intent, the court rejected *Gebardi* and upheld the defendant's conviction for aiding and abetting a person in the prohibited receipt of a firearm. *Id.* at 1200-01.

Using a similar analysis of legislative history, the Seventh Circuit has rejected the very argument raised by Alikhani in a factually similar case. *See United States v. Beck*,

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(Cont'd)
770 (1975) ("[a]n agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.").

The Eleventh Circuit recognizes the Supreme Court's suggestion in *Iannelli* that a court look at the elements of both the substantive offense and the conspiracy charge and if one requires proof of a fact that the other does not, then there is no violation of the Wharton Rule. *United States v. Brenson*, 104 F.3d 1267, 1283 (11th Cir. 1997) (when dealing with the crime of disclosure of grand jury information, an individual could violate the statute "singularly by simply providing such information to another individual when such disclosure would have the probable effect of impeding the due administration of justice, without any agreement with the second person.") Thus, a violation of the Wharton Rule requires consideration of the elements of a conspiracy charge which usually refers to the necessity of an agreement between two or more persons that may or may not be part of the substantive offense. The aiding and abetting statute requires no such agreement or additional element beyond the elements of the substantive offense.

615 F.2d 441 (7th Cir. 1980). In *Beck*, the defendant was found guilty of aiding and abetting the illegal export of arms and aiding and abetting the filing of false customs export declarations. The defendant, just like Alikhani, ordered and purchased the illegal merchandise. As in the instant case, the applicable regulation which Beck violated proscribed "export or attempt to export from the United States" particular items. 615 F.2d at 450; 22 C.F.R. § 127.01. Beck argued, and the trial court accepted, that he was not the exporter but the purchaser and that he did not aid an illegal export but only arranged a legal import. *Id.* Thus, Alikhani is of the same mind as was Beck in his argument before the Seventh Circuit.

The Seventh Circuit wholly rejected this argument as "semantics rather than substance." *Id.* By analogy, the court pointed out that a "purchaser of stolen goods is not liable as an aider and abetter of the theft because of his status as a buyer, but because he enters the plan too late." *Id.* (citing *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969)). The Seventh Circuit explained, "[t]he gravamen of the offense is the theft, not what happens to the goods afterwards. If the defendant does not aid the theft itself, he does not commit an act that aids the commission of the offense." *Id.*

As explained above, Executive Order 12543 and the Regulations proscribe the "export," that is "the movement of goods across the international border." *Id.* Like *Beck*, Alikhani did not simply purchase goods in Germany or Cyprus which had already been exported. He was the brains behind the whole export plan. He masterminded the export of the goods to Germany for transshipment to Libya. He

bragged of his contravention of the U.S./Libya embargo to the undercover agents and how he would mask the true destination of the oil machinery and parts to fool U.S. officials. He transferred money into the United States to pay for the parts, negotiated the terms of the exportations and entered into contractual relations with the Libyan government to act as an intermediary between it and legitimate U.S. corporations because Libyan corporations could not legally obtain parts for its oil machinery. Alikhani consciously assisted the transportation of the goods from the United States to Libya. To use the *Beck* court's phrase, "[h]e did not enter the plan too late, but did so right on time." *Id.* Further, any issue of intent which was presented to the *Beck* court does not exist here because Alikhani pled guilty and admitted to his knowledge that the goods at issue could not legally be exported to Libya. Thus, this Court embraces the rationale of the Seventh Circuit and in *Falletta* in rejecting Alikhani's contention that he is excepted from 18 U.S.C. § 2 because he was not an "exporter."

c. Policy Rationale

The Court hastens to point out that this application of § 2(b) in conjunction with the substantive violations charged is wholly consistent with the purposes behind the IEEPA, Executive Order 12543 and the Libyan Sanctions Regulations. The IEEPA expressly conferred upon the President the power to prohibit commercial transactions involving certain foreign nations "with respect to any property . . . subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1); *McKeeve*, 131 F.3d at 11. With that authority, President Reagan recognized that Libya posed a

threat to our national security, thereby launching a comprehensive prohibition, among other things, against trade with Libya or involving exports to Libya. *See* Executive Order 12543. It is clear from these authorities, as well as the Libyan Sanctions Regulations which followed, that it was Congress's and the Executive Branch's will to prevent U.S. goods and technology from reaching Libya. To permit Alikhani to escape liability here would amount to condoning deceptive schemes designed to circumvent the sanctions imposed by the United States government against Libya.

C. Alikhani's Constitutional Claim

As a final matter, Alikhani briefly contends that the export control law would be unconstitutional if applied to a non-U.S. person such as himself.[18] The constitutional basis for this argument is the void for vagueness doctrine. Alikhani argues that it is unclear on the face of the statutes what acts are prohibited and to whom the statutes/regulations apply, and therefore, they violate the due process clause of the Constitution. *See Maynard v. Cartwright*, 486 U.S. 356 (1988). Alikhani has failed to convince this Court that the IEEPA, Executive Order 12543 of the applicable sections of the Libyan Sanctions Regulations are vague or ambiguous. In the absence of any meritorious argument by Alikhani on this issue, the Court need not go any further with respect to this undeveloped argument. It is abundantly clear what is prohibited by the regulations, and Alikhani's statements, admissions and conduct make clear that he was fully aware that he was violating or attempting to circumvent U.S. law.

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18. He makes a similar argument with respect to the money laundering statute which has no relevance to Count II.

Appendix B

III. *CONCLUSION*

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Magistrate Snow's February 27, 1997 Report and Recommendation is AFFIRMED IN PART AND REVERSED IN PART. It is further

ORDERED AND ADJUDGED that the instant petition is DENIED AND DISMISSED. This action is hereby CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 14 day of September, 1998.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT
JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 19, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-5546-GG

HOSSEIN ALIKHANI, a.k.a. Hossein Alikani, a.k.a. J.A. Faram,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: COX and DUBINA, Circuit Judges and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Appendix C

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE